No. 86-724

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HERAEUS-AMERSIL, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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October 30, 1986

Questions Presented for Review

To assure fair and equal treatment of importers and uniform customs treatment of imports, 19 U.S.C. §1315(d) and regulations adopted under it require that any change in an established and uniform practice of merchandise classification be made by the Secretary of the Treasury only after publication in the Federal Register and submission to an administrative review and comment process. The courts below expressly found that such a practice existed, that the record left "no basis for determining otherwise" and that if the Secretary were to find otherwise he would be abusing his discretion. But, although the Secretary gave no reasoned analysis for the change, no publication appeared in the Federal Register, and there was no opportunity for public review and comment, the Court of Appeals neither ordered publication and review nor remanded the case. Instead, the Court assumed what the result of the review and comment procedure would have been, reclassified petitioner's merchandise, and thereby deprived it and other importers of their statutory rights and placed petitioner at an extreme economic disadvantage.

1. Where a court reviewing agency action makes a finding which by law should have been made by an agency and which if made by the agency would require the agency to take specific administrative action prior to making an adjudication, can the reviewing court adjudicate the matter without first having the agency follow the prescribed administrative procedure?

2. Must an agency which deliberately changes an established and uniform practice, altering its course and abandoning precedent, supply a reasoned analysis justifying the change, as all Courts of Appeal other than that for the Federal Circuit have required, and not casually ignore its prior practice and precedent?

Statement Pursuant to Supreme Court Rule 28.1

Heraeus Quarzschmelze, G.m.b.H., Parent Company of Heraeus-Amersil, Inc.

W.C. Heraeus, G.m.b.H., Parent Company of Heraeus Quarzschmelze, G.m.b.H.

Heraeus Holding, G.m.b.H., Parent Company of W.C. Heraeus, G.m.b.H.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HERAEUS-AMERSIL, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Heraeus-Amersil, Inc., petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit in this case.

Opinions Below

The opinion of the Court of Appeals for the Federal Circuit is reported at 795 F.2d 1575. The opinions of the Court of International Trade are reported at 617 F.Supp. 89, and 600 F.Supp. 221. All of said opinions are reprinted in the Appendix hereto.

Basis of Jurisdiction

This Court has jurisdiction over this proceeding under 28 U.S.C. §1254(1). The judgment of the Court of Appeals

for the Federal Circuit sought to be reviewed was entered on July 8, 1986. Rehearing was denied on August 1, 1986. This petition for a writ of certiorari is timely filed within the prescribed ninety day period.

Statutory Provisions Involved

Article I, Section 8, Clause 1 of the Constitution of the United States provides, in pertinent part:

> "The Congress shall have Power to lay and collect Taxes, Duties, . . . ; but all Duties, Imposts and Excises shall be uniform throughout the United States;"

19 U.S.C. §1315(d), as amended, provides:

> "No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling; but this provision shall not apply with respect to the imposition of antidumping duties, or the imposition of countervailing duties under section 1303 of this title."

The text of relevant portions of §177.10 of the Customs Regulations (19 CFR §177.10) is set out in the Appendix.

Statement of the Case

Petitioner is an importer of various grades of fused quartz and fused silica. For at least a ten year period,

through November of 1977, the United States Customs Service uniformly, and without any known variance, assessed duty on such importations under Item 540.11 or 540.41 of the Tariff Schedules of the United States (19 U.S.C. §1202), depending upon the shape of the articles imported.

In late 1977, a local customs official, apparently disagreeing with the former classification practice, independently imposed a new classification on the petitioner's goods in question only at his port of entry, which resulted in an increase of over 200% in the duties to be paid upon such goods.

Petitioner, by administrative protests pursuant to 19 U.S.C. §1514, requested that this change in classification be reviewed in light of evidence of the practice of the past ten years and in consideration of the provisions of 19 U.S.C. §1315(d). It was petitioner's position that said statute placed an affirmative burden upon the Secretary of the Treasury, or his delegee, to consider petitioner's claim and make a finding as to the existence or nonexistence of an established and uniform practice in classification of the goods in question. No such finding was made.

Petitioner then brought suit in the United States Court of International Trade to contest both the substantive classification of the merchandise, and the §1315(d) issue of the existence of an established and uniform practice to classify said goods under Items 540.11 and 540.41 of the Tariff Schedules. Prior to the taking of any testimony on the substantive issue of classification, on cross-motions for summary judgment the Court of International Trade held that an established and uniform practice did exist concerning the classification of petitioner's merchandise, and further held that the Court can and should make the necessary

finding concerning such practice, where the agency charged with the responsibility of making the finding either failed or refused to do so.

Having made the finding itself, rather than remanding to the Secretary, the Court then compared the effect of its finding to what the effect of the same finding by the Secretary would have been, and concluded that it was not the intent of Congress that the effect be the same. As a result, the Court held that publication pursuant to 19 U.S.C. §1315(d) was not necessary prior to the imposition of a higher rate of duty on the petitioner's goods. The act of imposition of the higher duty rate was substituted by the court as "notice" of the discontinuance of the practice, effective as to this one importer, in place of publication in the Federal Register. As a result of the Court's findings, partial judgment was rendered in favor of each party. It was held that merchandise entered into the United States prior to this "notice" to the petitioner was properly classifiable under the provisions formerly utilized under the established and uniform practice, and petitioner's motion for summary judgment ordering a return to those classifications was granted as to that merchandise. It was further held that merchandise entering the country after such "notice" was properly assessed at the higher rate of duty, and the government's motion to dismiss petitioner's claim under 19 U.S.C. §1315(d) was granted, leaving to be tried as to these later entries the issue of whether the "new" or "old" classification was in fact the proper one.

Both the government and the petitioner appealed the decision of the lower court. The government's appeal was from a final judgment, under 28 U.S.C. §1295(a)(5) (1982), and petitioner's cross-appeal pursuant to 28 U.S.C. §1292 (d)(1), after certification for interlocutory appeal of the issue regarding the application of 19 U.S.C. §1315(d) by

the Court of Appeals for the Federal Circuit. The appellate court affirmed on both appeals. The petitioner moved for rehearing with a suggestion that the matter be considered *en banc,* based on a claim that earlier opinions of the Court, rendered by judges not sitting in this case, were inconsistent. Petitioner's motion for rehearing was denied on August 1, 1986, and its suggestion for rehearing *en banc* was later declined. The government did not move for rehearing, and its time for petitioning for a writ of certiorari from this Court expired on October 7, 1986.

Reasons for Granting the Writ

1. The Remedy Crafted by the Courts Below Yields Results Different From Those Which Would Have Followed From the Agency Finding Which the Courts Made in Its Stead, and Avoids Agency Proceedings and Determinations Which Would Have Necessarily Followed.

If the Secretary of the Treasury (the Secretary), when properly presented with the issue of the existence of an established and uniform practice under 19 U.S.C. §1315(d), as the court found that he was (App. 12a), had found on the facts before him that an established and uniform practice did exist, on which issue the court determined that "there is no basis for determining otherwise" (App. 12a) and that to hold otherwise would have been an abuse of discretion (App. 12a footnote 12), then the increased duties which were imposed could not have been imposed prior to publication of notice of an intent to do so in the Federal Register, and the conduct of other administrative proceedings. The remedy crafted by the court circumvents all of these proceedings, and prevents the Secretary from making further decisions that he would have made once his error in not making a finding, or in making the wrong finding, was established, as it has been by the courts here.

If the Secretary finds that an established and uniform practice exists, and he wishes to change that practice so as to assess a higher rate of duty, he must publish a notice that the practice is under review, and give interested persons an opportunity to comment. 19 CFR §177.10(c). If, as a result of that review, the Secretary determines to change that practice, the change can only be made effective 90 days after publication of notice of intent to do so in the Federal Register. 19 CFR §177.10(e); [30 days under 19 U.S.C. §1315(d)]. No such ruling or notice may change an earlier practice unless that practice has been determined by the Secretary to be "clearly wrong." 19 CFR §177.10 (b). The action by the court here has assumed that the Secretary, now knowing that a practice *did* exist, would wish to change it; has taken out of his hands the power to decide that the earlier practice was "clearly wrong"; has denied any "interested persons" the opportunity to comment on such change; and has avoided the 30-day notice period provided by the statute, and the 90-day notice period provided by the regulations. Instead of rectifying the mistake of the Secretary, the action by the court has compounded the error, doing something the Secretary could not have done had he acted properly. Having determined that the finding which it made did not have the same effect as that same finding would have had if made by the Secretary, the court should have, under the full equitable powers granted to it by statute (28 U.S.C. §1585), granted relief in the nature of *mandamus* and ordered the Secretary to make the finding in question, and then proceed accordingly, This Court should determine whether the effect of a pure finding of fact by a court acting for an agency which did not act has an effect different from, and lesser than, the same finding made by the agency, and, if so, should consider whether remand is the appropriate remedy in all

such cases so as to avoid a frustration of the Congressional purpose.

If the relief afforded by the courts cannot equal that due from the agency according to law, then the system has failed. If the courts in this case cannot put the petitioner in the same position in which it would have been, had the Customs Service acted properly under the law (as each of the courts herein has found it should), then where is the relief which is supposed to accompany the correlative right? If the law grants the public a right, and the courts cannot act to enforce that right to its full extent, then the right in question does not, in fact, exist.

Having discharged its burden of proof and established that the higher rate of duty was imposed by a local customs official without delegated authority, petitioner requested the court to grant it the same relief to which it would have been entitled had the agency properly performed its function under the statute and regulations and made the requested finding. In an unprecedented reversal of its earlier position that the Secretary could not nullify the statute by refusing to act, the court in fact ratified his having done so by determining that the statutory provisions did not apply where the court made the determination in lieu of the agency. Under this decision, the importer received less from the court acting in place of the agency, than it would have received had the agency acted according to law in the first instance. Such result, which encourages an agency to avoid the controls imposed on it by Congress, by inaction where it properly should act, cannot be permitted to stand.

2. The Decisions Below Deviate From a Policy Well Established Under the Constitution.

The decision of the Court of Appeals for the Federal Circuit (CAFC) vastly deviates from a clearly established public and statutory policy mandating uniformity of treatment effectuated through published notice of change to the importing community, both importers and Customs officials alike. Because of the decisions below, petitioner has been denied this guarantee of uniform treatment provided under Article I, Section 8, Clause 1 of the Constitution of the United States, as reflected in 19 U.S.C. §1315(d) and the regulations promulgated by the Customs Service. Accordingly, we believe that the Courts should grant certiorari to review this issue.

Prior to the decision in this case, the CAFC and its predecessor, the Court of Customs and Patent Appeals, consistently recognized that an importer was entitled to the maintenance of a rate of duty which, through the passage of time, had become well established and uniform, unless the statutory and regulatory requirements of general notice by publication of a change in that practice were fulfilled. The statute involved was enacted almost fifty years ago (Customs Administrative Act of 1938, ch. 679, §6, 52 Stat. 1077, 1081), codifying what had been the regulatory practice of the agency for some thirty years prior, at least since 1907. (14 Treas. Dec 512, T.D. 28627, December 18, 1907). The statute was passed by Congress to lend certainty to the importing process, and to codify preclusion of the agency from changing an established and uniform practice, without giving the public and all Customs officers throughout the country notice of that change. The courts consistently recognized that the customs officials delegated by the Secretary of the Treasury to administer this provision could not avoid the consequences of public

notice (now required to be published in the Federal Register) by mere inaction or refusal to act. The decisions forewarned Customs that the court would intervene in such instances. See *Washington Handle Co.* v. *United States,* 34 CCPA 80, C.A.D. 346 (CCPA 1946); *Biddle Sawyer Corp.* v. *United States,* 320 F.2d 416 (CCPA 1963); *Ditbro Pearl Co., Inc.* v. *United States,* 515 F.2d 1157 (CCPA 1975); and *Siemens America, Inc.* v. *United States,* 692 F.2d 1382 (CAFC 1982). Until this case, however, there have been no appellate cases where an importer proved the existence of an established and uniform practice, in the face of failure of the agency to so find.

The court's decision here would allow an unauthorized customs official, with no consultation with Customs Headquarters or the Secretary of the Treasury, to bypass the statutory and regulatory safeguards given to the importing public, and to impose a higher rate of duty as against one importer by merely notifying that importer of his action. This decision effectively does away with Section 1315(d) of Title 19, where the Secretary does not act or refuses to act, and does away with both the right of the public to receive published notice in the Federal Register, and the 90-day lead time to enable both importers and Customs officials at all ports around the country to accommodate to the change. Notice to the latter is particularly important in bringing about the uniformity mandated by the Constitution, as Customs officials in California cannot be expected to know that Customs officials in New York may be acting contrary to an established practice, absent such notice.

Thus the uniformity mandated by the Constitution, to which the CAFC has alluded only in a footnote:

> "[14] We leave open the case of importers who are unaware of Customs' change, throughout individual ac-

> tion, in a previous uniform and established practice known to those importers as such but not acknowledged as such by Customs under §1315(d)." (App. 15a),

has been avoided, and each importer at the various ports of entry throughout the country is exposed to different treatment at different points in time, depending on when each receives actual "notice."

3. The Decisions of the Courts Below Conflict With Decisions of the Other Courts of Appeal.

The CAFC has approved the departure by Customs from a long standing precedent and practice without requiring that agency to give the notice to all interested parties which Section 315(d) is calculated to give by its requirement for publication in the Federal Register, and without requiring the agency to articulate its reasons for so doing. To quote professor Davis:

> "All twelve courts of appeals (excluding the newly-created Court of Appeals of the Federal Circuit) have strong and clear law forbidding an agency to depart from a precedent without acknowledging that it is doing so and explaining why. '[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.' Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), cert. denied 403 U.S. 923 (1971)." See Davis, K.C., *Administrative Law Treatise* (1983), Volume 4, p.x.

Under the holding of the CAFC, Customs is neither required to explain its departure from precedent, nor to give proper notice to the importing public or Customs officials throughout the country of the fact that such departure has occurred. The courts appear to have fashioned some equi-

table remedy, believed by them to be similar to Section 315(d). However this remedy does not comport with the statute, in that it does not give the notice to all interested parties which §315(d) is calculated to give by publication in the Federal Register, nor does it require the agency to make the finding that the precedent from which it is departing is "clearly wrong" as mandated by the agency's own regulation (19 CFR §177.10(b), nor does it require Customs to clearly advise the petitioner and others that it is departing from precedent, and why it is doing so. This Court, in *NLRB* v. *Wyman, Gordon,* 394 U.S. 759 (1969), with regard to other agency action held invalid a "rule" promulgated in an earlier decision by the NLRB, but not published by them in the Federal Register as required, stating:

> "The 'rule' created in Excelsior was not published in the Federal Register, which is the statutory and accepted means of giving notice of a rule adopted; only selected organizations were given notice of the 'hearing' whereas notice in the Federal Register would have been general in character; under the Administrative Procedure Act, the terms or substance of the rule would have to be stated in the notice of hearing, and all interested parties would have an opportunity to participate in the rule making." 349 U.S. at 764-765.

Here no notice of proposed change of practice in the established manner of classifying the goods in question was published in the Federal Register, the statutory and accepted means of giving such notice. In the instant case, only petitioner was ostensibly given notice, in the words of the CAFC, "through individual action", whereas legal notice in the Federal Register would have been general in character to the importing public. The CAFC "left open" the case of importers who were unaware of Customs

change, in its footnote 14 (App. 15a). This is hardly in conformity with the precept of giving adequate notice of departures from precedent and explaining the reasons for such departures. Under the situation created by the decision of the CAFC, notice can be given on an individual basis, thus creating a situation whereby several importers of the same type of merchandise receive notice at differing times, and therefore pay different duties upon the same merchandise until such time as effective notice may reach each of them of the change in custom's practice concerning classification of their merchandise. Does it not seem more logical that one notice be published in the Federal Register to accomplish this notice? Apparently Congress was of that opinion, as it included in Section 315 a specific requirement for the publication of such notice for departure from precedent in Customs classification cases.

This court has also clearly held that agencies must articulate the reasons for decisions, and must explain why they are departing from precedent. *NLRB* v. *Metropolitan Ins. Co.*, 380 U.S. 438 (1965). In the instant case the CAFC could not, because of custom's lack of articulated reasons for changing an established practice, determine if, why, or even when Customs decided to discontinue the practice in question. This Court and petitioner should not have to guess, as the CAFC did, ("it is most likely"—"it is also reasonable to interpret"—See App. 8a), whether the denial of the §315(d) claim in the protest was a denial that a uniform practice existed, and whether the liquidation of December 30, 1977 was a reflection of a determination by Customs to discontinue or change the existing practice. All of the other circuits and this Court have no problem in requiring a clearly expressed statement that an agency is departing from an earlier precedent, one that explains why that precedent is being abandoned, even in

the absence of a statute so specifically addressed to the question of that notice as is Section 315(d). This Court should correct this failure of the CAFC to require of an agency the clear expression of the fact that it is acting in reversing precedent, and why it is doing so, rather than permit such a fumbling *de facto* change as occurred in this case to stand. This is especially true as the CAFC has jurisdiction over the actions of a number of federal agencies.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

Appeal Nos. 86-602/650

HERAEUS-AMERSIL, INC.,

Appellee/Cross-Appellant,

v.

THE UNITED STATES,

Appellant/Cross-Appellee.

John J. Mahon, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellant. With him on the brief were *Richard K. Willard,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge International Trade Field Office.

Richard C. King, Fitch, King and Caffentzis, of New York, New York, argued for appellee. With him on the brief was *James Caffentzis.*

Appealed from: U.S. Court of International Trade

Judge Carman

Opinion of Court of Appeals dated July 8, 1986

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

Appeal Nos. 86-602/650

HERAEUS-AMERSIL, INC.,

Appellee/Cross-Appellant,

v.

THE UNITED STATES,

Appellant/Cross-Appellee.

DECIDED: July 8, 1986

Before RICH and DAVIS, *Circuit Judges,* and MILLER, *Senior Circuit Judge.*

DAVIS, *Circuit Judge.*

This is a consolidated appeal brought by the United States and Heraeus-Amersil, Inc. (Heraeus) from the memorandum opinion and order of the United States Court of International Trade,[1] holding that an established and uniform practice existed with respect to merchandise imported by Heraeus and also that the established and uniform practice was properly discontinued by the United States Customs Service (Customs) (notwithstanding the absence of publication in the Federal Register) because

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[1] *Heraeus-Amersil, Inc.* v. *United States,* 617 F. Supp. 89, —— CIT —— (1985) (Carman, *J.*).

Heraeus had actual notice of the change in classification of the merchandise.[2] We affirm.

I.

Heraeus imports merchandise known as fused quartz or fused silica in various shapes and sizes. From 1968 through November 1977, 300 entries were documented at the ports of Newark and John F. Kennedy International Airport (JFK). There is nothing in the record to suggest that identical or similar merchandise was imported at any port other than Newark or JFK. At least five import specialists were responsible for advisory classification of Heraeus' merchandise during that ten-year period. These import specialists uniformly classified the merchandise (depending upon shape) under item 540.11 of the Tariff Schedules of the United tates (TSUS)[3] at 7.5% ad val., or item 540.41, TSUS,[4] at 7% ad val.

There is no evidence that the merchandise was ever classified differently prior to December 30, 1977. In 1977, however, a new Customs import specialist was placed at JFK. This import specialist made a new advisory classification

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[2] The relevant facts are contained in a stipulation of facts on which the trial court based its decision on cross-motions for summary judgment.

[3] Item 540.11, TSUS, as modified by T.D. 68-9, provides:

Glass, in the mass; glass, crushed, powdered or flaked (frostings); and waste or scrap glass; all the foregoing except glass provided for in items 540.21 and 540.27:

Glass in the mass:

540.11	Containing over 95 percent silica by weight	7.5% ad val.

[4] Item 540.41, TSUS, as modified by T.D. 68-9, provides:

Glass rods, tubes, and tubing, all the foregoing not processed:

540.41	Containing over 95 percent silica by weight	7% ad val.

resulting in the change in classification of Heraeus' merchandise to item 540.67, TUSU,[5] at 25% ad val.

The merchandise now at issue was imported from Germany during March through December 1976, and in April 1981, and was liquidated under item 540.67. Heraeus timely filed protests challenging the classification of the merchandise under that item, and claiming the existence of an established and uniform practice to classify such merchandise under item 540.11 or item 540.41. These protests were denied.

Heraeus then brought suit in the Court of International Trade contesting the classification of its merchandise under item 540.67, and arguing that, in the absence of a finding by the Secretary of the Treasury (Secretary), the court itself could find that an established and uniform practice existed to classify the merchandise under item 540.11 or item 540.41 within the meaning of § 315(d) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1315(d) (1982),[6] and

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[5] Item 540.67 of the TSUS, as modified by T.D. 68-9, provides:

> Optical glass in any form, including blanks for spectacle lenses and for other optical elements; non-optical-glass blanks for corrective spectacle lenses; synthetic optical crystals in the form of ingots, segments of ingots, sheets, or blanks for optical elements; all the foregoing not optically worked; polarizing material, in plates or sheets, not cut to shape or mounted for use as polarizing optical elements;
>
> * * *
>
> 540.67 Other optical glass and synthetic optical crystals; polarizing material .....25% ad val.

[6] Section 1315(d) of Title 19 United States Code (1982) provides:

> No administrative ruling resulting in the imposition of a higher rate of duty or charge that the Secretary of the Treasury shall find to have been applicable to imported mer-

(footnote continued on following page)

that this established and uniform practice precluded classification at the higher rate of duty until Customs complied with the notice provision of § 1315(d), *supra*. The United States argued that the matter should be remanded back to the Secretary to make the necessary findings because the trial court lacked the authority to determine whether such a practice in fact existed. In the alternative, the Government contended that the new classification was valid because the § 1315(d) notice requirement is predicated upon a finding (absent here) by the Secretary of an established and uniform practice.

On cross-motions for summary judgment, the court first restated its earlier holding in *Heraeus-Amersil, Inc.* v. *United States*, 600 F. Supp. 221, 8 CIT —— (1984) (denying Heraeus' motion to dismiss in part), that an established and uniform practice could be shown, in the absence of a finding by the Secretary, by actual uniform liquidations. In that earlier opinion, the court had noted that "[e]arlier cases suggest that a section 1315(d) 'established and uniform practice' can be predicated on uniform classifications and liquidations at various ports over a period of time." *Id.* at 223. The court reasoned that the question whether an established and uniform practice existed would not have been considered in prior cases if the issue was not relevant to those courts' ultimate determinations. Also sup-

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(footnote continued from previous page)

chandise under an established and uniform practice shall be effective with respect to aritcles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling; but this provision shall not apply with respect to the imposition of anti-dumping duties or the imposition of countervailing duties under section 1303 of this title.

porting the court's holding was a predecessor regulation to 19 C.F.R. § 177.10(b) (1985) which evidenced Customs' understanding at one time "that section 1315(d) envisioned an 'actual' established and uniform practice." *Id.* at 224. Hearings before the House Ways and Means Committee likewise manifested the belief that the *de facto* existence of a uniform practice was of major importance to Customs. *Id.* For these reasons, the court denied the motion to dismiss in part and concluded that, in the absence of a finding by the Secretary, it could decide whether an actual uniform practice existed.

In the decision now under review the court also held that an actual established and uniform practice classifying Heraeus' merchandise under item 540.11 and item 540.41 existed despite the fact that the Secretary had not made a finding to that effect. *Heraeus-Amersil,* 617 F. Supp. at 93. The basis of the court's holding was "the classification [by Customs] of fused quartz/fused silica under items 540.11 and 540.41 span[ning] a period of at least 10 years. Over 300 liquidations at two ports under these item numbers have been documented. The parties have been unable to find any evidence of variant liquidations during the 10-year period or earlier." *Id.* The court distinguished, however, a classification based on an actual practice from one based upon a finding by the Secretary, and held that the former could be extinguished by the discontinuance of such a practice if known to the importer. *Id.* at 94-95. Here, such knowledge existed as of December 30, 1977.

Both sides have appealed to this court. The Government filed its appeal (No. 86-602) under 28 U.S.C. § 1295(a)(5) (1982) from the final decision of the trial court denying the higher duties for the items imported in 1976. Heraeus cross-appeals (in No. 86-650) under 28 U.S.C. § 1292(d)(1)

(1982) from Judge Carman's certification of the question whether the established and unfair practice was changed by Customs, so far as Heraeus is concerned, on December 30, 1977. This court has accepted the cross-appeal by order of November 6, 1985.

Heraeus contends before us that (1) the actual existence of an established and uniform practice under § 1315(d) does not depend upon a determination by the Secretary; (2) the trial court properly found that such a practice in fact existed here; and (3) the trial court erred in holding that the established and uniform practice could be extinguished other than by compliance with the Tariff Act's publication requirement (§ 1315(d)). The Government argues that (1) the Act requires a finding by the Secretary, and in the absence of a finding, the trial court is powerless to make the determination itself, (2) assuming the court could make an established and uniform practice determination, Heraeus failed to demonstrate that one existed in this instance, and (3) assuming the court properly found that an established and uniform practice existed, it correctly held that the practice ended when the merchandise was initially liquidated at the higher rates.

II.

The first issue is whether a court can find that an established and uniform practice exists in the absence of a finding by the Secretary to that effect. The United States both in its brief and at oral argument refuses to acknowledge that an established and uniform practice recognized by § 315(d) of the Tariff Act of 1930, as amended at 19 U.S.C. § 1315(d), *supra*, can exist pursuant either to a finding by the Secretary that such a practice exists *or* (when the Secretary fails to act on a request for such a

finding) upon a judicial finding of an actual practice of liquidating a significant number of entries of particular merchandise at the same rates over an extended period of time. The latter is the situation we have here.

In its protest dated August 10, 1978, Heraeus in effect requested the Secretary to make a finding that an established and uniform practice existed with respect to the then imported optical grade glass. The protest noted expressly that the change in classification of the merchandise was unwarranted because of the existence of "[a]n established and uniform practice . . . to classify such merchandise under items other than item 540.67." The United States urges that this specific content of the protest did not amount to an official request upon the Secretary and was not sufficient to trigger the obligation of the Secretary to make a determination. The answer is that, in the absence of any language in the applicable regulations providing other procedures that importers should follow in requesting a finding by the Secretary, Heraeus' request constituted as specific a request and was as inherently reasonable as the law may properly demand. Under the present regulations, nothing more is required. *See Commonwealth Oil Refining Co.* v. *United States,* 332 F. Supp. 203, 209, 67 Cust. Ct. 155, 163 (1971), *aff'd on other grounds,* 480 F.2d 1352 (CCPA 1973). It is also reasonable to interpret the simple denial of that protest, not as a denial on the merits as to whether an established and uniform practice existed, but rather as the failure of the Secretary to act on the subject in any respect. If there had been a denial of the existence of such practice, it is most likely that something would have been said along that line.

When the Secretary thus fails to act upon a request to make a finding, the court can and should make that deter-

mination itself,[7] rather than remanding the matter back to the Secretary for further consideration. The underlying issue is the actual existence of an established and uniform practice. If such a practice existed, the Secretary should have found it to have existed. *Ditbro Pearl Co.* v. *United States,* 515 F.2d 1157, 1159, 62 CCPA 95, 97 (1975) (Markey, *CJ,* concurring).[8] Contrary to the United States' postulate that an established and uniform practice arises upon only a formal finding by the Secretary (or a ruling published pursuant to 19 C.F.R. § 177.10(b) (1985)),[9] the courts have consistently made such findings where the

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[7] Where the Secretary does act upon a request, deciding either that an established and uniform practice does or does not exist, that action cannot be disturbed "absent a clear abuse of discretion." *Rank Precision Indus.* v. *United States,* 660 F.2d 476, 480, 68 CCPA 78, 84 (1981).

[8] *See Ditbro Pearl,* 515 F.2d at 1159-60, 62 CCPA at 98, where J. Miller (concurring) noted that "The 'key' issue is whether appellant sustained its burden of proving that the rate of duty contended for was applicable to its merchandise 'under an existing and uniform practice'."

[9] 19 C.F.R. § 177.10(b) provides:

> (b) *Rulings regarding a rate of duty or charge.* Any ruling regarding a rate of duty or charge which is published in the Customs Bulletin will establish a uniform practice. A published ruling may result in a change of practice, it may limit the application of a court decision, it may otherwise modify an earlier ruling with respect to the classification or valuation of an article or any other action found to be in error or no longer in accordance with the current views of the Customs Service, or it may revoke a previously-published ruling or a previously-issued ruling letter. No ruling published under the provisions of this section will have the effect of changing either an earlier published ruling or a practice established by other means by imposing a higher rate of duty or charge on an article unless the earlier ruling or practice has been determined to be clearly wrong.

actual existence of a uniform practice was at issue.[10] *See, e.g., Siemens America, Inc.* v. *United States,* 692 F.2d 1382, 1384, 1 Fed. Cir. (T) 9, 10 (1982) ("we agree . . . that appellants have nevertheless failed to sustain their burden of proving that there existed an established and uniform practice"); *Commonwealth Oil Refining Co.* v. *United States,* 480 F.2d 1352, 1362-63, 60 CCPA 162, 176 (1973) ("Commonwealth has failed to come forth with affirmative, convincing evidence of the existence of a long-established practice at Philadelphia"); *Biddle Sawyer Corp.* v. *United States,* 320 F.2d 416, 422, 50 CCPA 85, 92 (1963) ("[w]e find nothing in the testimony or in the exhibits which supports appellant's contention that there was an established and uniform practice"); *B.R. Anderson & Co.* v. *United States,* 201 F. Supp. 319, 328, 47 Cust. Ct. 215, 228 (1961) ("under such circumstances no established and uniform practice had been demonstrated to have existed"). If an established and uniform practice could exist upon only a finding by the Secretary, § 1315(d) would be rendered "a nullity in the hands of a Secretary choosing to refrain from ever making a finding." *Ditbro Pearl,* 515 F.2d at 1159, 62 CCPA at 97 (Markey, *CJ,* concurring).

In these previous cases, the judicial search for a uniform practice concentrated largely on evidence of uniform classification and liquidation of merchandise at various ports over an extended period of time. *Heraeus-Amersil, Inc.* v. *United States,* 600 F. Supp. at 223. In *Siemens America,* 692 F.2d at 1383-84, 1 Fed. Cir. (T) at 10, this court—

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[10] As succinctly stated by the trial court in its first opinion in *Heraeus-Amersil,* "[o]ne must therefore conclude that the issue was meaningful to the determination. Otherwise, it would seem that the courts were engaging in useless formulations." 600 F. Supp. at 224.

assuming *arguendo* that a formal administrative finding was not a prerequisite to an established and uniform practice—considered and rejected Siemens America's argument that an unpublished letter ruling and "the subsequent liquidation of approximately 100 entries under [one] item" over a two-year period at one port—the port of New York—created such a practice. Siemens America failed to carry its burden of establishing the existence of an established and uniform practice, in part, because it did not establish that it was the sole importer of the merchandise or that the merchandise was imported solely at the port of New York. The court implied, however, that, with adequate proof, an established and uniform practice could be judicially found to exist. Although the appellant in *Washington Handle Co.* v. *United States,* 34 CCPA 80 (1946), introduced evidence suggesting that the merchandise was imported for a two-year period solely at two subports, the court held that an established and uniform practice did not exist. The court noted that at the beginning and throughout the two-year period, "there was considerable uncertainty as to its proper classification." *Id.* at 86. Moreover, an investigation as to the proper classification was conducted during this period. The court intimated, again, that it might have reached a different conclusion in a less chaotic setting:

> we think it proper to say that 28 shipments of the instant imported materials at two subports, *under the circumstances here recited,* cannot properly be held to constitute an 'established and uniform practice' in respects with which we are here concerned.

Id. (emphasis added). Sufficient proof did exist in *Emil Deinert,* 9 Cust. Ct. 411, 412 (1942), in which the Customs

Court found that an established and uniform practice existed where the merchandise was uniformly classified for a period of eight years.

On the basis of these consistent statements, we must conclude that, where the Secretary fails to respond to a request that he find the existence of an established and uniform practice, the courts can make that finding in his stead. Nothing in the text or legislative history of § 1315(d) prohibits that course.

III.

Before the Court of International Trade, Heraeus submitted, and the United States did not challenge,[11] that over a ten-year period, at the only two ports at which the merchandise was imported, more than 300 entries were classified under item 540.11 or 540.41 (depending upon shape). There is no evidence in the record of any liquidation of the merchandise under item 540.67 or any other item prior to December 31, 1977. During that ten-year period, there was never any doubt as to the proper classification. On this evidence, the court properly held that Heraeus successfully proved the existence of an established and uniform practice. There is no basis for determining otherwise.[12]

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[11] The United States now argues that an established and uniform practice can only arise where there are uniform liquidations throughout the United States. Thus, since the liquidations here occurred only in the New York region, no such practice existed. This contention runs counter to common sense—not all goods are imported throughout the country—and finds no support in the statute, legislative history, or prior case law.

[12] If we were to assume, contrary to all the probabilities, that Customs' simple denial of Heraeus' protest was intended as a denial of the existence of the asserted uniform and established practice,

(footnote continued on following page)

In its cross-appeal, Heraeus contends that the established and uniform practice of liquidating the merchandise under items 540.11 and 540.41 cannot be changed until publication pursuant to § 1315(d). Congress provided in § 1315(d) that

> No administrative ruling resulting in the imposition of a higher rate of duty or charge *than the Secretary of the Treasury shall find to have been applicable* to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption . . . prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling.

(emphasis added). In enacting this provision, Congress recognized that the importing community relies upon the existence of established and uniform practices in conducting their business.[13] If the Secretary makes a finding that

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that administrative determination would have been, on the basis of the known and proved facts, an abuse of discretion.

Because this case is so clear, we need not now consider whether a trial court's determination of the existence *vel non* of an established and uniform practice is purely a question of fact or is a "mixed" question of law and fact.

[13] Customs recognized this policy in a predecessor regulation to 19 C.F.R. § 177.10(b) which provided that "[i]f there is an established and uniform practice at the various ports," a higher duty rate could not be imposed without public notice. Customs Regulations of 1943, § 16.10(a). It was thus "Customs' understanding, originally at least, that section 1315(d) envisioned an 'actual' established and known practice." *Heraeus-Amersil*, 600 F. Supp. at 224. *See also Customs Administrative Bill: Hearings on H.R. 6738 Before the House Comm. on Ways & Means*, 75th Cong., 1st Sess. 212-13 (1937) (statement of American Tariff League):

> We recognize that this section is legislation to legalize that which has been the practice of the Department for a number

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an established and uniform practice has existed, the Secretary should not revoke that practice prior to publication of notice to that effect in the Federal Register. By that means, the Secretary's change in the pre-existing practice (as he has established it or found it to be) is made known to all importers throughout the country. Similarly, where an established and uniform practice has been judicially found (because Customs refused to pass on that issue) to classify particular merchandise under a specific tariff provision, the importing community should be afforded a grace period to permit it to make business decisions in light of any new agency action changing that practice. Accordingly, where the merchandise was entered before the actual discontinuance of the practice, the rate in existence at the time the merchandise was imported applies until notice of the change is given. As the trial court stated:

> Customs may dispense with the publication requirement only after the practice has been discontinued and an importer is on actual or constructive notice of the discontinuance.

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> of years, namely, where there has existed a uniform practice, sanctioned by the customs authorities for a number of years before a change of rate or classification is made by the Department, the Department will allow before placing the same in effect 30 days' notice after publication of such change. While we recognize the existence of this practice, it has been carried on, we may say, as a matter of executive leniency, but there has been no sanction of law.

See also id. at 132 (analysis submitted by Treasury Department):

> The last sentence of the proposed amendment is a paraphrase of the present customs regulation which grant 30 days notice to importers and others before adverse administrative rulings resulting in a change in a uniform and established practice becomes effective. The fairness of such regulations is evident . . . .

Heraeus-Amersil, 617 F. Supp. at 95. However, it was not the intent of Congress when it enacted the § 1315(d) notice provision that, where the Secretary (though requested) failed to decide whether an established and uniform practice existed and that determination had to be made by the court, the lack of a published notice in the Federal Register would bar the application of an administrative change in rates even though the affected importer was specifically informed that Customs had changed its practice. The words of § 1315(d)—which relate solely to a change in duties found by the Secretary to have been imposed under an established and uniform practice—do not so provide, and we know of no sufficient reason why Congress would have desired substantially to prolong use of a formerly-employed rate known by the particular importer to have already been abandoned by Customs (which has not itself acknowledged the existence of that practice).[14]

In this case, Heraeus had actual notice of the change in classification as of December 1977. The next group of importations involved here was entered in April 1981. If we accepted Heraeus' point that it is entitled to the application of the lower rates until Customs complies with the § 1315(d) notice provision of publication in the Federal Register, Heraeus could receive a windfall because the lower (putatively incorrect) rate would apply to the April 1981 merchandise even though Heraeus knew of Customs' change in classification three years earlier.[15] For these rea-

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[14] We leave open the case of importers who are unaware of Customs' change, through individual action, in a previous uniform and established practice known to those importers as such but not acknowledged as such by Customs under § 1315(d).

[15] Heraeus relies on a number of internal Customs' procedures for the argument that no deliberate change in a uniform and es-

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sons, the Court of International Trade correctly determined that the entries entered before December 30, 1977 must be reliquidated under items 540.11 or 540.41 but not those entries entered after December 30, 1977.[16]

AFFIRMED.

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tablished classification practice could be made until certain internal steps were taken. One flaw in that proposition is that there is no *finding* that the agent who reclassified the merchandise was cognizant of the existence of the established and uniform practice.

[16] As to those later entries, Heraeus remains free to challenge the correctness of item 540.67 on its own merits, if proper protests have been filed.

Judgment of Court of Appeals dated July 8, 1986

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

Appeal Nos. 86-602/650

HERAEUS-AMERSIL, INC.,

Appellee/Cross-Appellant,

v.

THE UNITED STATES,

Appellant/Cross-Appellee.

JUDGMENT

ON APPEAL from the United States Court of International Trade

in CASE NO(S). 81-1-00100

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

/s/ FRANCIS X. GINDHART
Francis X. Gindhart, Clerk

DATED JUL 8 1986

ISSUED AS A MANDATE: August 8, 1986

Order of Court of Appeals dated August 1, 1986

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

Appeal Nos. 86-602/650

HERAEUS-AMERSIL, INC.,

Appellee/Cross-Appellant,

v.

THE UNITED STATES,

Appellant/Cross-Appellee.

Before RICH and DAVIS, *Circuit Judges,* and MILLER, *Senior Circuit Judge.*

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

/s/ FRANCIS X. GINDHART
Francis X. Gindhart, Clerk

8/1/86
.....
Date

cc: Mr. Richard C. King
Mr. John J. Mahon, DOJ

Memorandum Opinion and Order of Court of International Trade dated August 27, 1985

SLIP OP. 85-88

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: CARMAN, JUDGE

Consolidated Court No. 81-1-00100

HERAEUS-AMERSIL, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

MEMORANDUM OPINION AND ORDER

[Plaintiff's motion for summary judgment granted in part; defendant's cross-motion for summary judgment granted in part.]

Decided: August 27, 1985

Fitch, King & Caffentzis *(**Richard C. King*** and ***James Caffentzis*** on the motion) for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; ***Joseph I. Liebman,*** Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (***John J. Mahon*** on the cross-motion) for defendant.

Memorandum Opinion and Order of Court of International Trade dated August 27, 1985

CARMAN, JUDGE: Defendant moves, pursuant to rules 52 and 59 of the rules of this Court, for amendment and/or rehearing (clarification) of this Court's memorandum opinion and judgment of June 6, 1985. Plaintiff consents to this motion. The Court agrees that there is need for clarification, therefore grants the motion and vacates the prior opinion and judgment, Slip Op. 85-60.

In Slip Op. 85-60, the Court granted plaintiff's motion for summary judgment, but limited its holding to entry number 188,596, which was the only entry covered by the original summons in Court No. 81-1-00100. However, during the course of the litigation, additional entries were severed from other cases and consolidated with Court No. 81-1-00100, which became designated as Consolidated Court No. 81-1-00100. All entries the subject of this consolidated action are thus:

Court Number	*Protest Number*	*Entry Number*	*Date of Entry*	*Date of Liquidation*
80-9-01139-S	1001-8-004428	K350112	3/5/76	1/6/78
		K458138	7/2/76	1/6/78
		K499020	8/9/76	1/6/78
		K522573	8/31/76	1/6/78
		K522628	8/31/76	1/6/78
81-1-00100	1001-8-010167	188596	12/12/76	5/12/78
82-9-01243-S	1001-0-011514	804694	3/13/81	7/31/81
		804807	4/17/81	2/31/81
		804885	4/27/81	7/21/81

The rationale of the Court's opinion in this case affects the disposition of the various entries differently. It is therefore necessary for the Court to explain in detail the application of its holding to the involved entries.

Memorandum Opinion and Order of Court of International Trade dated August 27, 1985

NATURE OF THE CLAIM

In this action, which originally came before the Court on plaintiff's motion for summary judgment, plaintiff contends that its imported merchandise, known as "fused quartz" or "fused silica," should be classified under items 540.11 and 540.41 of the Tariff Schedules of the United States (TSUS). The basis of plaintiff's claim is that the more than 300 known liquidations of entries over a 10 year period of like or similar merchandise classified under the same claimed item numbers constitutes "an established and uniform practice" within the meaning of 19 U.S.C. § 1315(d) (1982)[1] An established and uniform practice of classifying fused quartz and fused silica under items 540.11 and 540.41 would, according to plaintiff, preclude the United States Customs Service (Customs) from classifying the merchandise under item 540.67, TSUS, as it did in this case, because of the failure to follow the notice procedures prescribed by sect[illegible] . 1315(d) prior to deviating from the alleged established and uniform practice.

Defendant, in cross-moving for partial summary judgment respecting plaintiff's section 1315(d) claim, contends that the notice requirement resulting from an established and uniform practice is predicated upon a "finding" of such

[1] 19 U.S.C. § 1315(d) (1982) provides:

No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling; but this provision shall not apply with respect to the imposition of antidumping duties, or the imposition of countervailing duties under section 1303 of this title.

practice by the Secretary of the Treasury.[2] Defendant claims that plaintiff has failed to prove that a uniform practice existed, but irrespective of such practice, plaintiff is not entitled to relief in the absence of a finding by the Secretary. Defendant therefore asserts it is entitled to summary judgment in its favor dismissing the uniform and established practice claim.

Defendant claims, in the alternative, that this Court lacks authority to determine whether a uniform and established practice existed; therefore, the case should be remanded to the Secretary of the Treasury to make the appropriate affirmative or negative finding. The defendant requests the Court further to certify the question for an interlocutory appeal pursuant to 28 U.S.C. § 1292(d)(1) (1982) should the Court grant any relief to plaintiff or adhere to the Court's earlier decision in *Heraeus-Amersil, Inc.* v. *United States,* 8 CIT ——, 600 F. Supp. 221 (1984) (denying defendant's motion to dismiss that part of the complaint relating to an established and uniform practice, and holding that plaintiff may show such practice under 19 U.S.C. § 1315(d) by actual uniform liquidations).

Stipulated Facts

Plaintiff imports optical grade fused quartz or fused silica at the ports of Newark and John F. Kennedy International Airport (JFK). Upon the liquidation of plaintiff's optical types that were imported from Germany during March-December, 1976 and April, 1981, Customs classified

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[2] The Customs regulations provide that a uniform practice may also be established by publication of a ruling pursuant to 19 C.F.R. § 177.10(b) (1984).

the merchandise in issue under item 540.67, TSUS.[3] In the previous period of 1968 through November, 1977, Customs liquidated other entries of plaintiff's same optical types under items 540.11 and 540.41, TSUS.[4] Over 300 documented entries at the two ports mentioned above resulted in classification and liquidation under these item numbers. All merchandise identical or similar to plaintiff's optical types was classified prior to December 30, 1977, under either item 40.11 or 540.41.[5] There is no evidence that any

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[3] Item 540.67 of the TSUS, as modified by T.D. 68-9, provides:

Optical glass in any form, including blanks for spectacle lenses and for other optical elements; non-optical-glass blanks for corrective spectacles lenses; synthetic optical crystals in the form of ingots, segments of ingots, sheets, or blanks for optical elements; all the foregoing not optically worked; polarizing material, in plates or sheets, not cut to shape or mounted for use as polarizing optical elements;

* * * * *

540.67 Other optical glass and synthetic optical crystals; polarizing material .....25% ad val.

[4] Item 540.11, TSUS, as modified by T.D. 68-9, provides:

Glass, in the mass; glass, crushed, powdered or flaked (frostings); and waste or scrap glass; all the foregoing except glass provided for in items 540.21 and 540.27:

Glass in the mass:

540.11 Containing over 95 percent silica by weight .....7.5% ad val.

Item 540.41, TSUS, as modified by T.D. 68-9, provides:

Glass rods, tubes, and tubing, all the foregoing not processed:

540.41 Containing over 95 percent silica by weight .....7% ad val.

[5] This stipulated fact has been further clarified in the memoranda submitted by the parties in support of plaintiff's motion for amendment and/or rehearing. The first entry of merchandise liquidated pursuant to the new classification practice was entry

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optical grade fused quartz/fused silica entered by plaintiff or any other importer was ever classified as "optical glass" under item 540.67, TSUS, or under its 1930 Tariff Act predecessor, prior to December 30, 1977. Further, there is no evidence of the importation of merchandise identical or similar to that the subject of this case at any port other than Newark or JFK.

From 1968 through November, 1977, at least five import specialists at the Newark and JFK ports of entry uniformly made advisory classifications of plaintiff's optical types under items 540.11 or 540.41. In 1977, however, another import specialist assumed advisory classification responsibility at JFK for plaintiff's optical types. This specialist made a new advisory classification which resulted in the change of classification to item 540.67.

The Secretary of the Treasury or his lawful delegee concededly made no "finding" under 19 U.S.C. § 1315(d) of whether an established and uniform practice existed as to the classification of optical grade fused quartz or fused silica. Accordingly, the Secretary never published, pursuant to section 1315(d), a notice of proposed change of practice in the classification of the merchandise at issue.

Opinion

In *Heraeus-Amersil, Inc.* v. *United States,* 8 CIT——, 600 F. Supp. 221 (1984), this Court, in deciding defendant's motion to dismiss in part, considered whether a uniform and established practice could arise from uniform classifi-

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number 522578. The merchandise, entered on August 6, 1976, was liquidated on December 30, 1977, under item 540.67, TSUS. Plaintiff's protest of that liquidation, filed March 30, 1978, is now part of a separate judicial action, Court No. 80-7-01138.

cations of like merchandise over a period of time which would bind Customs unless the change in practice was executed pursuant to 19 U.S.C. § 1315(d). The Court held that the plaintiff could show an established and uniform practice by actual uniform liquidations, even though the Secretary of the Treasury had made no "finding" that such a practice existed. It is clear that the established and uniform practice Congress contemplated is antecedent to a finding. *Siemens America, Inc.* v. *United States,* 2 CIT 135, 138 (1981), *aff'd* 692 F.2d 1382 (Fed. Cir. 1982). The applicability of section 1315(d) is thus not necessarily dependent upon a finding by the Secretary. *See Heraeus-Amersil,* 8 CIT at ——, 600 F. Supp. at 225. "In the absence of an affirmative or negative finding, . . . the Court, when properly presented with the issue, may resolve it." *Id.* at ——, 600 F. Supp. at 224.

The controlling question now before the Court, then, is whether in light of the stipulated facts an *actual* established and uniform practice existed with respect to the classification of optical grade fused quartz or fused silica. In the briefs submitted in support of the cross-motions for summary judgment, and at oral argument, much of the argument of the parties was a rehash of the question regarding the necessity of a finding by the Secretary of the Treasury in order for an established and uniform practice to arise within the purview of section 1315(d). This question was previously adequately briefed and decided by the Court. *See Heraeus-Amersil,* 8 CIT ——, 600 F. Supp. 221 (1984). The Court adheres to the rationale of its prior opinion which is the law of this case.[6] *See* 18 C. Wright,

[6] The Court gleaned that Congress, in codifying a then-existing administrative practice by enacting section 1315(d) "was attempt-

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A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 788 (1981).

Precedents concerning what specifically constitutes an established and uniform practice under section 1315(d) are unfortunately sparse. Nevertheless, the Court can make

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ing to lend certainty to the importing process. The importing community is thus aided by the provision's remonstrance that an established and uniform practice not be changed absent public notice. [Citation omitted.]" *Heaeus-Amersil,* 8 CIT at ——, 600 F. Supp. at 223.

The Court held that implementation of this congressional intent was not necessarily dependent upon a finding by the Secretary of the Treasury. This conclusion was reached by looking at what had been considered in other cases decided under section 1315(d). Given that "many cases have passed on the question of whether an actual uniform practice existed," one is led to "conclude that the issue was meaningful to the determination. Otherwise, it would seem that the courts were engaging in useless formulations." 8 CIT at ——, 600 F. Supp. at 224.

Second, the effect of having section 1315(d) dependent on a finding by the Secretary would be the nullification of the Congressional purpose in certain cases:

> To be sure, when the Secretary makes a finding that an established and uniform practice either exists or does not exist, that determination is within the Secretary's congressionally designated discretion. *See Washington Handle Co.* v. *United States,* 34 CCPA 80, 86 (1946). Such a determination cannot be disturbed by a court, except, perhaps, for an abuse of that discretion. *See Rank Precision Industries, Inc.* v. *United States,* 68 CCPA 78, 84, 660 F.2d 476, 480 (1981). In the absence of an affirmative or negative finding, however, the Court, when properly presented with the issue, may resolve it. In this connection, I well heed Chief Judge Markey's stern admonition in the *Ditbro Pearl* case that to hold otherwise "would render § 315(d) a nullity in the hands of a Secretary choosing to refrain from ever making a finding." *Ditbro Pearl Co.* v. *United States,* 62 CCPA 95, 97, 515 F.2d 1157, 1159 (Markey, C.J., concurring).

8 CIT at ——, 600 F. Supp. at 224.

the determination on a case-by-case basis according to certain guiding principles. *See* 8 CIT at ——, 600 F. Supp. at 225. Factors to be considered are the number of entries resulting in the alleged uniform classifications, the number of ports at which the merchandise was entered, the period of time over which the alleged uniform classifications took place, and whether there had been any uncertainty regarding the classification over its history. In essence, the question is whether a *uniform* and *established* practice existed that would lead an importer, in the absence of notice that a change in classification will occur, reasonably to expect adherence to the established classification practice when making an importation.

In this case, the classification of fused quartz/fused silica under items 540.11 and 540.41 spanned a period of at least 10 years. Over 300 liquidations at two ports under these item numbers have been documented. The parties have been unable to find any evidence of variant liquidations during the 10-year period or earlier. On the basis of this large number of past entries over the long time period involved, the Court finds that plaintiff was entitled to rely upon the continued classification of its optical types under items 540.11 and 540.41 absent published notice of a contemplated change in classification practice pursuant to section 1315(d).

The only authority directly on point indicates that the classification practice here has existed well beyond the time span required for an established and uniform practice. Thus, in *Emil Dienert* v. *United States*, 9 Cust. Ct. 411, Abs. 47,544 (1942), the court found that 5 to 8 years of classifying merchandise as a particular article constituted an established and uniform practice. Since there was no

evidence that notice to impose a higher rate was published, the court held that "Treasury officials did not comply with the provisions of section 6, Customs Administrative Act of 1938 [19 U.S.C. § 1315(d)]," and that the action of the collector in classifying the articles under a new category was "without legal force and effect." *Id.* at 412. The court did not discuss the necessity of a finding.

In many of the cases involving section 1315(d), the issue was whether or not some action by Customs constituted a finding. *See Heraeus-Amersil,* 8 CIT at —— n.7, 600 F. Supp. at 224 n.7. The actual existence of an established and uniform practice has nevertheless often been discussed by the courts to support holdings that the Secretary of the Treasury had not made a section 1315(d) finding. *E.g., Siemens America, Inc.* v. *United States,* 692 F.2d 1382 (Fed. Cir. 1982), *aff'g* 2 CIT 136 (1981); *see Heraeus-Amersil,* 8 CIT —— n.8, 600 F. Supp. at 10 n.8. These discussions are helpful, however, in demonstrating what practices on the part of Customs are not established and uniform.

In *Siemens,* 100 entries of merchandise classified under a particular item number over possibly 2 years at a single port was not enough to create *de facto* an established and uniform practice. 2 CIT at 139. That controversy centered on a ruling letter pertaining to future importations of the plaintiff's merchandise. The plaintiff argued that the letter followed by a corresponding 2 years of uniform classifications constituted a uniform and established practice. Evidence showed, however, that entries just prior to the letter were liquidated under another item number, with protests denied after the letter, suggesting that Customs had not

definitively decided on the correct classification. *See Siemens,* 692 F.2d at 1384 & n.*.

Similarly, in *Washington Handle Co.* v. *United States,* 34 CCPA 80, C.A.D. 346 (1946), like classification treatment of twenty-eight shipments over a 2-year period was not enough to create an established and uniform practice. Important to the court was the "considerable uncertainty" as to the proper classification during even the 2-year period. *Id.* at 86.

Prior discussions demonstrate that when Customs has not had a reasonable opportunity to investigate adequately the proper classification for a type of imported merchandise, an established and uniform practice will not arise in tne interim. In *Naumes Forwarding Service* v. *United States,* 42 CCPA 110, C.A.D. 581 (1955), for example, Customs re-evaluated its method for determining the ratio representing the amount of imported concentrated lemon juice to natural juice. The court found that Customs was not required to follow the notice provisions of section 1315(d) when changing from a practice employed in liquidating entries over a 2-month period to one "based on 'the best current and authentic data.' " *Id.* at 112.

In the case now before the Court, nothing indicates that Customs was uncertain or was reconsidering the classification of fused quartz/fused silica prior to changing the classification of this merchandise. The Court is impressed that the practice existed for at least 10 years. Only upon reassignment of advisory classification responsibility did an import specialist initiate the change to classification under item 540.67. Unless Customs publishes notice of a contemplated change, the legislative objective under section 1315(d) of "lending certainty to the importing process"

would clearly be circumvented. *See Heraeus-Amersil*, 8 CIT at ——, 600 F. Supp. at 223. The failure of Customs to provide notice is not excused by the omission of a "finding" regarding an established and uniform practice.

In adhering to the above conclusion, the Court does not endorse plaintiff's further contention that Customs is bound *ad infinitum* by a now discontinued "established and uniform practice" unless Customs publishes notice of the change in classification practice. Merchandise of entries subsequent to the change is not necessarily entitled to classification based on an administrative practice that has been discontinued and is therefore in retrospect no longer established and uniform. This result is different from that of the situation in which the importer bases its claimed classification on a *finding* by the Secretary of the Treasury that an established and uniform practice existed. *See Rank Precision Industries, Inc.* v. *United States*, 68 CCPA 78, 84, C.A.D. 1269, 660 F.2d 470, 480 (1981). Just as an importer's claim may be based on an *actual* uniform practice, so may the claim be extinguished by the discontinuance of such practice. Adoption of plaintiff's position could lead to the absurd result of allowing importers to go back through the records, find long-discontinued "established and uniform practices" and protest classifications accordingly, in total disregard of what everyone involved knows is the current position of Customs regarding the merchandise.

In the case before the Court, there is no question that plaintiff was on actual notice of the change in classification practice as of December 30, 1977. The subsequent group of importations involved in this action was not entered until April of 1981. Plaintiff is therefore not entitled to

have these later entries of merchandise classified on the basis of a practice which Customs had discontinued and not followed for over 3 years.

Conclusion

For the foregoing reasons, plaintiff's motion for summary judgment is granted in part. In these circumstances where Customs displayed no ambivalence as to the classification of plaintiff's merchandise for 10 years in 300 liquidations, the Court holds that as a matter of law an established and uniform practice existed. For merchandise entered prior to the discontinuance of the practice, Customs' classification under a variant item number would have been valid only if preceded by publishing notice of the change pursuant to 19 U.S.C. § 1315(d). Customs may dispense with the publication requirement only after the practice has been discontinued and an importer is on actual or constructive notice of the discontinuance. The involved entries made before December 30, 1977, must accordingly be reliquidated under items 540.11 or 540.41.

Regarding those entries occurring after December 30, 1977, plaintiff's motion for summary judgment is denied and defendant's cross-motion respecting plaintiff's claim under section 1315(d) is granted. As plaintiff was aware that the administrative practice upon which it had based its claimed classification of merchandise in the later entries had long been discontinued, the established and uniform practice claim as to these entries must be dismissed.

/s/ Gregory W. Carman
Gregory W. Carman, Judge

Dated: August 27, 1985
New York, New York

Order of Court of International Trade dated August 27, 1985

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: HONORABLE GREGORY W. CARMAN, JUDGE

Consolidated Court No. 81-1-00100

HERAEUS-AMERSIL, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

ORDER

Upon reading and filing defendant's motion for amendment and/or rehearing (clarification) of the Memorandum Opinion and Judgment in Slip Op. 85-60 (June 6, 1985), plaintiff's response thereto, and upon all other papers and proceedings had herein, it is hereby

ORDERED, ADJUDGED and DECREED:

1. that defendant's motion for amendment and/or rehearing is granted;
2. that this Court's Memorandum Opinion and Judgment of June 6, 1985, Slip Op. 85-60 is vacated and set aside;
3. that plaintiff's motion for summary judgment is granted in part;

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4. that defendant's cross-motion for partial summary judgment is granted in part;

5. that the Customs officials shall reliquidate the optical fused quartz or fused silica the subject of Court Numbers 80-9-01139-S and 81-1-00100 previously liquidated under item 540.67, TSUS, under either item 540.11 or 540.41, as modified by T.D. 68-9, TSUS, as appropriate, and refund to plaintiff the excess duties paid together with interest as provided by law; and

6. that the established and uniform practice claim regarding the merchandise subject of Court Number 82-9-01243-S be dismissed.

The issues involved in this determination include a controlling question of law with respect to which there is a substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

/s/ Gregory W. Carman
Gregory W. Carman, Judge

Dated: August 27, 1985
New York, New York

Memorandum Opinion and Order Etc.
dated December 13, 1984

SLIP OP. 84-134

UNITED STATES COURT OF
INTERNATIONAL TRADE

BEFORE CARMAN, JUDGE

Court No. 81-1-00100

HERAEUS-AMERSIL, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

MEMORANDUM OPINION AND ORDER ON PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S CROSS-MOTION TO DISMISS IN PART.

[Plaintiff's motion to strike denied;
defendant's cross-motion to dismiss
in part denied.]

Decided: December 13, 1984

Fitch, King & Caffentzis (*Richard C. King* on the motion) for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*John J. Mahon* on the cross-motion) for the defendant.

Memorandum Opinion and Order Etc.
dated December 13, 1984

CARMAN, Judge: Plaintiff moves pursuant to Rules 8(c) and 12(f) of the Rules of the United States Court of International Trade[1] for an order striking certain denials from the defendant's answer. Defendant opposes the motion and cross-moves to dismiss in part for failure to state a claim upon which relief can be granted pursuant to rule 12(b)(5).

The underlying dispute pertains to the proper classification of certain imported merchandise known as "fused quartz" or "fused silica." The United States Customs Service (Customs) classified the merchandise under item 540.67 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68-9.[2] Plaintiff claims that

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[1] Rule 8(c) of the Rules of this Court provides in relevant part:

> *Defenses—Form of Denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as true and material and shall deny only the remainder. . . .

Rule 12(f) in part reads:

> *Motion to Strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense . . . .

[2] Item 540.67 of the TSUS, as modified, provides:

> Optical glass in any form, including blanks for spectacle lenses and for other optical elements; non-optical-glass blanks for corrective spectacle lenses; synthetic optical crystals in the form of ingots, segments of ingots, sheets, or blanks for

(footnote continued on following page)

classification is proper under items 540.11 and 540.41 of the TSUS.[3] Plaintiff, in supporting its proposed classification, claims that at the relevant times "an established and uniform practice" existed within the meaning of 19 U.S.C. § 1315(d) (1982) with respect to the classification of fused quartz and fused silica.[4] Under plaintiff's theory, Customs could not deviate from that practice until 30 days after publication of a notice in the Federal Register.

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optical elements; all the foregoing not optically worked; polarizing material, in plates or sheets, not cut to shape or mounted for use as polarizing optical elements;

. . . . .

Other optical glass and synthetic optical crystals; polarizing material .....25% ad val.

[3] Item 540.11, TSUS, as modified, provides:

Glass, in the mass; glass, crushed, powdered, or flaked (frostings); and waste or scrap glass; all the foregoing except glass provided for in items 540.21 and 540.27:

Glass in the mass:

Containing over 95 percent silica by weight ....7.5% ad val.

Item 540.41, TSUS, as modified, provides:

Glass rods, tubes, and tubing, all the foregoing not processed:

Containing over 95 pervent silica by weight .....7% ad val.

[4] 19 U.S.C. § 1315(d) (1982) provides:

No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling; but this provision shall not apply with respect to the imposition of antidumping duties, or the imposition of countervailing duties under section 1303 of this title.

Defendant denies that an established and uniform practice existed. Defendant maintains that absent a "finding" that such a practice exists by the Secretary of the Treasury, or a ruling published by Customs pursuant to 19 C.F.R. § 177.10(b) (1983),[5] no established and uniform practice can arise. Defendant therefore concludes that paintiff's claims as to a uniform practice fail as a matter of law and must be dismissed.

As is evident from paragraph 37 of the complaint, plaintiff believes that because similar merchandise at various ports has been uniformly classified under items 540.11 and 540.41 since 1963, that this practice constitutes an "established and uniform practice" within section 1315(d).

Defendant's answer at paragraph 40 offers a simple "Denied" in response to the established and uniform practice claim and further avers that no section 1315(d) "finding" has ever been made. Plaintiff moves to strike this denial, as well as the similar denial in paragraph 42 of the answer, on the ground that the responses constitute defenses that are insufficient as a matter of law.

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[5] 19 C.F.R. § 177.10(b) (1983) provides:

> *Rulings regarding a rate of duty or charge.* Any ruling regarding a rate of duty or charge which is published in the Customs Bulletin will establish a uniform practice. A published ruling may result in a change of practice, it may limit the application of a court decision, it may otherwise modify an earlier ruling with respect to the classification or valuation of an article or any other action found to be in error or no longer in accordance with the current views of the Customs Service, or it may revoke a previously-published ruling or a previously-issued ruling letter. No ruling published under the provisions of this section will have the effect of changing either an earlier published ruling or a practice established by other means by imposing a higher rate of duty or charge on an article unless the earlier ruling or practice has been determined to be clearly wrong.

In response, defendant claims simply that the responses in paragraph 40 and 42 are sufficient as a matter of law. Defendant also cross-moves to dismiss that part of the complaint relating to an established and uniform practice, paragraphs 35 through 42.

The Court first addresses defendant's motion to dismiss in part because resolution of this issue impacts largely upon plaintiff's motion to strike.

I. An Established and Uniform Practice

Underlying defendant's motion to dismiss in part is the assumption that "an established and uniform practice" under section 1315(d) can only arise from a formal "finding" by the Secretary or by a "ruling" published pursuant to 19 C.F.R. § 177.10(b) (1983). Plaintiff, on the other hand, asserts that such a practice can be established by actual liquidations over a period of time at many ports.

Subsection (d) of section 1315 was added to the Tariff Act of 1930 by the Customs Administrative Act of 1938, ch. 679, § 6, 52 Stat. 1077, 1081 (codified as amended at 19 U.S.C. § 1315(d) (1982)). Legislative history pertaining to the 1938 Act is sparse, but reveals Congress' desire "to facilitate efficient administration of the customs laws." S. Rep. No. 1465, 75th Cong., 3d Sess. 6 (1938). The proposed enactment was termed neither "an importers' bill nor . . . a domestic manufacturers' bill." *Id.* Nevertheless, it would appear that Congress, in subsection (d), by codifying a then-existing administrative practice, was attempting to lend certainty to the importing process. The importing community is thus aided by the provision's remonstrance that an established and uniform practice not be changed absent public notice. *See Customs Administrative Bill:*

Hearings on H.R. 6738 Before the House Comm. on Ways and Means, 75th Cong., 1st Sess. 132 (1937) (analysis submitted by Treasury Department).

Earlier cases suggest that a section 1315(d) "established and uniform practice" can be predicated on uniform classifications and liquidations at various ports over a period of time. *See, e.g., Asiatic Petroleum Corp.* v. *United States,* 59 CCPA 20, 23, 449 F.2d 1309, 1312 (1971) (adopting *Asiatic Petroleum Corp.* v. *United States,* 64 Cust. Ct. 47, 58, 309 F. Supp. 1006, 1009 (1970) (Richardson, J., dissenting)); *Biddle Sawyer Corp.* v. *United States,* 50 CCPA 85, 92, 320 F.2d 416, 422 (1963); *B.R. Anderson & Co.* v. *United States,* 47 Cust. Ct. 215, 226-28, 201 F. Supp. 319, 327-28 (1961). In *Biddle Sawyer,* the Court of Customs and Patent Appeals expressly considered the issue of whether uniform classification of a certain chemical, in fact, existed. The court concluded:

> We find nothing in the testimony or in the exhibits which supports appellant's contention that there was an established and uniform practice of classifying merchandise of the quality of the imported [merchandise] under paragraph 5. Therefore it was not necessary that a notice be published pursuant to sections 315(d) or 16.10(a).

Biddle Sawyer, 50 CCPA at 92, 320 F.2d at 422. In fact, many cases have passed on the question of whether an actual uniform practice existed at the relevant times.[6] One

[6] Section 1315(d) was designed to promote uniformity in classification matters. It does not apply to other customs determinations, such as appraisement. *Peugeot Motors of America, Inc.* v. *United States,* 8 CIT ——, Slip Op. 84-103, at 7-8 (Sept. 13, 1984).

must therefore conclude that the issue was meaningful to the determination. Otherwise, it would seem that the courts were engaging in useless formulations.

In addition, a predecessor regulation to 19 C.F.R. § 177.10 (b), provided that "[i]f there is an established and uniform practice *at the various ports,*" no higher duty rate could be assessed without public notice. Customs Regulations of 1943, § 16.10(a) (emphasis added); *see B.R. Anderson & Co.* v. *United States,* 47 Cust. Ct. at 227, 201 F. Supp. at 327 ("[i]t is clear that this regulation was issued pursuant to section 315(d) of the Tariff Act of 1930"). Thus, it was Customs' understanding, originally at least, that section 1315(d) envisioned an "actual" established and uniform practice.

Further, the hearings before the House Ways and Means Committee reflect a general understanding of section 1315 (d) in accord with that outlined above.

> We recognize that this section is legislation to legalize that which has been the practice of the Department for a number of years, namely, where there has existed a uniform practice, sanctioned by the customs authorities for a number of years, before a change of rate or classification is made by the Department, the Department will allow before placing the same in effect 30 days' notice after publication of such change. While we recognize the existence of this practice, it has been carried on, we may say as a matter of executive leniency, but there has been no sanction of law.

Hearings, supra, at 212-13 (statement of American Tariff League).

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Defendant's opposition to the motion of an actual established and uniform practice stems from its blurring of cases where the existence of a section 1315(d) finding was in issue.[7] To be sure, when the Secretary makes a finding that an established and uniform practice either exists or does not exist, that determination is within the Secretary's congressionally designated discretion. *See Washington Handle Co.* v. *United States,* 34 CCPA 80, 86 (1946). Such a determination cannot be disturbed by a court, except, perhaps, for an abuse of that discretion. *See Rank Precision Industries, Inc.* v. *United States,* 68 CCPA 78, 84, 660 F.2d 476, 480 (1981). In the absence of an affirmative or negative finding, however, the Court, when properly presented with the issue, may resolve it. In this connection, I well heed Chief Judge Markey's stern admonition in the *Ditbro Pearl* case that to hold otherwise "would render § 315(d) a nullity in the hands of a Secretary choosing to refrain from ever making a finding." *Ditbro Pearl Co.* v. *United States,* 62 CCPA 95, 97, 515 F.2d 1157, 1159 (Markey, C.J., concurring).[8]

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[7] There is no strict formula for issuing a "finding" under section 1315(d). Such a finding can take many forms, and, indeed, the cases reflect this. *See Rank Precision Indus., Inc.* v. *United States,* 68 CCPA 78, 660 F.2d 476 (1981) (letter from Division Director); *Ditbro Pearl Co.* v. *United States,* 62 CCPA 95, 515 F.2d 1157 (1975) (abstracted Treasury Decision); *Asiatic Petroleum Corp.* v. *United States,* 59 CCPA 20, 449 F.2d 1309 (1971) (letter from Acting Commission of Customs). The proper test for a section 1315(d) finding is merely whether a clear impression is given through appropriate language that such a finding is being made. *Asiatic Petroleum,* 59 CCPA at 23, 449 F.2d at 1312; 64 Cust. Ct. at 59, 309 F. Supp. at 1014 (Richardson, J., dissenting).

[8] Recently, in *Siemens America, Inc.* v. *United States,* 692 F.2d 1382 (Fed. Cir. 1982), the Federal Circuit (formerly the Court

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Defendant objects to the Court making such determinations, contending that "there is no law to apply." "There are no criteria by which to gauge how long a practice must exist or how uniform it must be." Defendant's Memorandum In Opposition, at 24. This view is obviously unfounded since courts have long considered such issues both under section 1315(d), *Biddle Sawyer Corp.* v. *United States,* 50 CCPA, 85, 92, 320 F.2d 416, 422 (1963), and under the interpretive principle that a "long-established administrative practice," if found to exist, will bear upon an interpretation of tariff laws, *Commonwealth Oil Refining Co.* v. *United States,* 60 CCPA 162, 174, 480 F.2d 1352, 1361 (1973). Indeed, courts have long been guided in this area by inquiring whether the practice was "known, long continued, uniform and general." *Rapken & Co., Ltd.* v. *United States,* 25 CCPA 268, 274 (1938).

In accordance with the above, defendant's motion to dismiss that part of the complaint relating to an established and uniform practice must be denied, since although no finding or published ruling is alleged, plaintiff may show an established and uniform practice under section 1315(d) by

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of Customs and Patent Appeals) indicated that a formal "finding" is not a precondition to application of section 1315(d). *See id.* at 1384. The court assumed for argument's sake that a finding was not necessary and then considered plaintiff's offer of proof on the question. Because proof on the issue of an established and uniform practice was found wanting, the court held against the importer.

The case strongly suggests that an actual practice is cognizable under section 1315(d). By considering the sufficiency of the evidence on the point, the Federal Circuit implied that with adequate proof, such a practice can be found, in fact, to exist.

actual uniform liquidations at the various ports over a period of time.

II. Motion to Strike Certain Defenses

Having determined that plaintiff may be allowed to demonstrate whether an actual section 1315(d) practice existed during the relevant times, the Court now turns to plaintiff's motion to strike certain denials contained in the defendant's answer.

Plaintiffs' motion relates to the following:

Complaint

> 37. "Optical quality fused silica" on or after August 31, 1963, and until liquidation of the entries in issue herein, was uniformly classified by various District Directors or Area Directors of Customs as "glass in the mass: Containing over 95 percent silica by weight" under item 540.11, TSUS, or as "Glass rods, * * *, all the foregoing not processed; Containing over 95 percent silica by weight" under item 540.41, TSUS depending upon its form as imported.
>
> . . . .
>
> 40. The uniform classification as described in 37), above, constitutes an actual established and uniform practice.
>
> . . . .
>
> 42. Liquidation under item 540.67, TSUS, as amended, is improper where an actual established and uniform practice existed at the time of liquidation, and no notice pursuant to § 315(d) has been published.

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ANSWER

40. Denied. Further, defendant avers that the Secretary of the Treasury or his delegate have never made a finding pursuant to 19 U.S.C. § 1315(d) that an established and uniform practice existed regarding the tariff classification of the merchandise in issue.

. . . .

42. Denied.

Plaintiff contends that the defendant, by simply denying the allegation of an established and uniform practice, severely hampers discovery efforts and motion practice. Plaintiff urges that the "defense" in paragraph 40, if it be one, must consist of more than a simple denial.[9]

The Court is therefore called upon to weigh the legal sufficiency of the denials contained in paragraph 40 and 42 of defendant's answer.

Rule 8(c) of the Rules of this Court provides in part that "[a] party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." The rule, patterned after Rule 8(b) of the Federal Rules of Civil Procedure, is designed to apprise a plaintiff of the defenses with which he will have to contend at trial. Lawyers Co-operative Publishing Co., *Federal Procedure* § 62.56, at 230 (J. Goger man. ed. 1984); *see White* v. *Smith*, 91 F.R.D. 607, 608 (W.D.N.Y. 1981). Motions di-

[9] The second sentence of paragraph 40 of defendant's answer is largely superfluous since the court has determined that a formal "finding" by the Secretary is not a prerequisite to the operation of 19 U.S.C. § 1315(d).

rected to the sufficiency of denials and defenses, such as motions to strike or for a more definite statement, are highly disfavored. *Krauss* v. *Keibler-Thompson Corp.*, 72 F.R.D. 615, 618 (D. Del. 1976). Courts traditionally have allowed such motions only where under no circumstances could the defense prevail, *Green Mountain Power Corp.* v. *General Electric Corp.*, 496 F. Supp. 169, 171 (D. Vt. 1980), where the defense is clearly "insufficient as a matter of law," *Anchor Hocking Corp.* v. *Jacksonville Electric Corp.*, 419 F. Supp. 992, 1000 (M.D. Fla. 1976), or where the defense "bear[s] no possible relation to the claim asserted," *Blenke Brothers Motors, Inc.* v. *Chrysler Corp.*, 189 F. Supp. 420, 422 (N.D. Ill. 1960).

Given the stringency of the standard for striking defenses on insufficiency grounds, plaintiff's motion must be denied. Paragraph 40 of the complaint, operative here, states that the events described in paragraph 37 constitute an established and uniform practice. Defendant's answer, in relevant part (*see supra* note 9) simply states, "Denied." In *Berkey Technical Corp.* v. *United States*, 71 Cust. Ct. 275, 380 F. Supp. 786 (1973), the court was confronted with a similar question. In that case, plaintiff's complaint read: "Said articles are not illuminating." Defendant's answer was simply: "Denied." There, Judge (now Chief Judge) Re held that the answer was sufficient as a matter of law, noting that while "a more elaborate answer could have been drafted . . . , the denial was neither equivocal nor ambiguous." *Id.* at 276, 380 F. Supp. at 788.

By the same token here, the complaint asserts that certain acts on the part of Customs constituted an established and uniform practice under 19 U.S.C. § 1315(d). The effect of defendant's denial is to state that those acts do not

constitute such a practice. The "denied" is a "clear and positive response that categorically denie[s] plaintiff's allegation." *Berkey Technical Corp.*, 71 Cust. Ct. at 276, 380 F. Supp. at 788. Defendant's answer at paragraph 40 operates either to deny that the facts alleged constitute an established and uniform practice or that the facts themselves, as alleged, are disputed.

Plaintiff's entreaties to the effect that it cannot fashion appropriate motion practice or discovery must be rejected. The issue has been framed adequately by the pleadings. It now devolves on plaintiff, through appropriate discovery, to substantiate the claim asserted in paragraphs 35 through 42 of the complaint.

Plaintiff's motion to strike certain defenses contained in defendant's answer is denied; defendant's cross-motion to dismiss in part is also denied.

Order accordingly.

/s/ Gregory W. Carman
Gregory W. Carman, Judge

Dated: December 13, 1984
New York, New York

Order of Court of International Trade dated December 13, 1984

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: CARMAN, JUDGE

Court No. 81-1-00100

HERAEUS-AMERSIL, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

ORDER

Upon reading and filing plaintiff's motion to strike certain denials contained in defendant's answer, defendant's opposition thereto and cross-motion to dismiss paragraphs 35-42 of the complaint for failure to state a claim upon which relief may be granted, and upon all other papers and proceedings had herein, it is hereby

ORDERED that plaintiff's motion be, and the same hereby is, denied; and it is further

ORDERD that defendant's cross-motion to dismiss paragraphs 35-42 of the complaint be, and the same hereby is, denied.

/s/ GREGORY W. CARMAN
Gregory W. Carman, Judge

Dated: December 13, 1984
New York, New York

Code of Federal Regulations, Title 19, Section 177.10 (1975)

Publication of rulings.

* * *

(b) Rulings regarding a rate of duty or charge. Any ruling regarding a rate of duty or charge which is published in the Customs Bulletin will establish a uniform practice. * * * No ruling published under the provisions of this section will have the effect of changing either an earlier published ruling or a practice established by other means by imposing a higher rate of duty or charge on an article unless the earlier ruling or practice has been determined to be clearly wrong.

(c) Changes of practice or position. (1) Before the publication of a ruling which has the effect of changing a practice and which results in the assessment of a higher rate of duty, notice that the practice (or prior ruling on which the practice is based) is under review will be published in the Federal Register and interested parties given an opportunity to make written submissions with respect to the correctness of the contemplated change. * * *

(e) * * * If the ruling involves merchandise, it will be applicable to all unliquidated entries, except that a change of practice resulting in the assessment of a higher rate of duty or increased duties shall be effective only * * * on or after the 90th day after publication of the change in the Customs Bulletin.

NOTE: T.D. 78-394 (1978) changed publication to Federal Register rather than Customs Bulletin.

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No. 86-724 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1986

HERAEUS-AMERSIL, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether imported merchandise may be classified at a higher tariff without following the 30-day notice and publication requirements of 19 U.S.C. 1315(d) where a court, rather than the Secretary of the Treasury, has determined that there was an "established and uniform practice" of classifying that kind of merchandise at a lower tariff and the importer had actual notice that the Customs Service has abandoned its earlier classification practice.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 795 F.2d 1575. The opinion of the Court of International Trade (Pet. App. 19a-31a) is reported at 617 F. Supp. 89. The previous opinion of the Court of International Trade (Pet. App. 34a-46a) is reported at 600 F. Supp. 221.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a) was entered on July 8, 1986. A petition for rehearing was denied on August 1, 1986 (Pet. App. 18a). The petition for a writ of certiorari was filed on October 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Heraeus-Amersil, Inc., imports fused quartz and fused silica into the United States (Pet. App. 3a). From 1968 through November 1977, the Customs

Service classified all of petitioner's imports under the provisions of the Tariff Schedules of the United States covering certain "glass in the mass" and similar products and "glass tubing" and similar products (*ibid.*). In December 1977, however, the Customs Service determined that such merchandise should be classified under a different provision covering "optical glass" and retroactively applied the new (and higher) tariff rate to merchandise that had been imported between March and December 1976 (*id.* at 3a-4a). Later, the Customs Service also applied the higher tariff rate to merchandise that petitioner imported in April 1981 (*id.* at 4a).

2. Petitioner filed timely administrative protests concerning each application of the higher tariff rate (Pet. App. 4a). The Customs Service denied the protests (*ibid.*). Accordingly, petitioner filed suit in the Court of International Trade, alleging, inter alia, that the Customs Service had a "uniform and established practice" of classifying this merchandise at the lower tariff and that the Customs Service was therefore precluded from reclassifying petitioner's imports until it complied with the 30-day notice and publication requirements of 19 U.S.C. 1315(d). Pet. App. 4a-5a. The United States responded, inter alia, that the court lacked authority to determine whether any such "established and uniform practice" existed and that the matter should be remanded to the Secretary of the Treasury to make the necessary findings (*id.* at 5a.).

The court held, contrary to the argument of the United States, that it had authority to determine whether an "established and uniform practice" of classifying particular merchandise existed (Pet. App. 24a-27a, 38a-43a). Moreover, it agreed with petitioner that the Customs Service's practice over a 10-year period of consistently classifying petitioner's merchandise under the same tariff provision constituted an actual "established and uniform practice" notwithstanding the Secretary's failure to make

an administrative "finding" to this effect (*id.* at 25a-30a). But the court rejected petitioner's "further contention that Customs is bound *ad infinitum* by a now discontinued 'established and uniform practice' unless Customs publishes notice of the change in classification practice" (*id.* at 30a). The court reasoned that "[a]doption of [petitioner's] position could lead to the absurd result of allowing importers to go back through the records, find long-discontinued 'established and uniform practices' and protest classifications accordingly, in total disregard of what everyone involved knows is the current position of Customs regarding the merchandise" (*ibid.*). Accordingly, the court held that, since "[petitioner] was on actual notice of the change in classification practice as of December 30, 1977" (*ibid.*), the "entries made before December 30, 1977, must * * * be reliquidated" (*id.* at 31a), but the "entries occurring after December 30, 1977" need not be reliquidated (*ibid.*).

3. On appeal by both the United States and petitioner, the Federal Circuit affirmed (Pet. App. 1a-16a). It agreed with petitioner that, "[c]ontrary to the United States' postulate that an established and uniform practice arises upon only a formal finding by the Secretary * * *, the courts have consistently made such findings where the actual existence of a uniform practice was at issue" (*id.* at 9a-10a). Likewise, it found that the Court of International Trade had "properly held that [petitioner] successfully proved the existence of an established and uniform practice" (*id.* at 12a). Finally, the Federal Circuit rejected petitioner's contention "that the established and uniform practice of liquidating the merchandise under [the lower tariff rate] cannot be changed until publication pursuant to [19 U.S.C.] 1315(d)" (*id.* at 13a), finding that "it was not the intent of Congress when it enacted the 1315(d) notice provision that, where the Secretary (though requested) failed to decide whether an established and uniform practice

existed and that determination had to be made by the court, the lack of a published notice in the Federal Register would bar the application of an administrative change in rates even though the affected importer was specifically informed that Customs had changed its practice" (*id.* at 15a). The court reasoned that "[t]he words of 1315(d)—which relate solely to a change in duties found by the Secretary to have been imposed under an established and uniform practice—do not so provide" (*ibid.*), and that there is "no sufficient reason why Congress would have desired substantially to prolong use of a formerly-employed rate known by the particular importer to have already been abandoned by Customs * * *" (*ibid.*). Accordingly, the court held that "the Court of International Trade [had] correctly determined that the entries entered before December 30, 1977 must be reliquidated * * * but not those entries entered after December 30, 1977" (*id.* at 16a (footnote omitted)).

DISCUSSION

The court below correctly held that the Customs Service could apply a higher tariff rate to merchandise that petitioner imported long after December 30, 1977, when petitioner had actual notice of the revised classification. That holding does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner principally contends (Pet. 5-7) that, under the governing statute, the Secretary of the Treasury may not change *any* practice found to be "established and uniform" until he publishes a notice of intent to do so in the Federal Register. This contention is incorrect.

The statute provides only that "[n]o administrative ruling resulting in the imposition of a higher rate of duty or charge than *the Secretary of the Treasury shall find* to have been applicable * * * under an established and uniform practice shall be effective * * * prior to the

expiration of thirty days after the date of publication in the Federal Register of notice of such ruling" (19 U.S.C. 1315(d) (emphasis added)). The statute thus precludes the Secretary from changing a tariff without publication only where the Secretary has made a "finding" that an "established and uniform practice" was in existence. See *Commonwealth Oil Refining Co.* v. *United States*, 480 F.2d 1352, 1360-1361 (C.C.P.A. 1973); *Martin Brokerage Co.* v. *United States*, 36 Cust. Ct. 35, 39, C.D. 1750 (1956). Here, of course, it was the Court of International Trade which determined that an "established and uniform practice" existed. Accordingly, on its face, the statute does not preclude the Secretary from applying a higher tariff rate to petitioner's merchandise.

Nor does the purpose of the statute require that the Secretary be precluded from imposing a higher tariff in these circumstances. The publication requirement acknowledges "that the importing community relies upon the existence of established and uniform practices in conducting their business" (Pet. App. 13a). Thus, "[i]f the Secretary makes a finding that an established and uniform practice has existed, the Secretary should not revoke that practice prior to publication of notice to that effect in the Federal Register" (*id.* at 13a-14a). "By that means, the Secretary's change in the pre-existing practice (as he has established it or found it to be) is made known to all importers throughout the country" (*id.* at 14a). "Similarly, where an established and uniform practice has been judicially found (because Customs refused to pass on that issue) * * * the importing community should be afforded a grace period to permit it to make business decisions in light of any new agency action changing that practice" (*ibid.*). But requiring the Customs Service to apply "the rate in existence at the time the merchandise was imported * * * until notice of the change is given" accomplishes this purpose (*ibid.*). It ensures that the importer is not charged a tariff of which it does not have advance notice.

In contrast, requiring the Secretary to follow the publication requirement when a court, rather than the Secretary, determines that an "established and uniform practice" existed would have a deleterious effect on the administration of the customs statute. "If we accepted [petitioner's] point that it is entitled to the application of lower rates until Customs complies with the 1315(d) notice provision of publication in the Federal Register, [petitioner] could receive a windfall because the lower (putatively incorrect) rate would apply to the April 1981 merchandise even though [petitioner] knew of Customs' change in classification three years earlier" (Pet. App. 15a (footnote omitted)). Indeed, "[a]doption of [petitioner's] position could lead to the absurd result of allowing importers to go back through the records, find long-discontinued 'established and uniform practices' and protest classifications accordingly, in total disregard of what everyone involved knows is the current position of Customs regarding the merchandise (*id.* at 30a). This clearly is not a tenable interpretation of the customs law. See generally *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 318 (1933).

Finally, petitioner errs in suggesting that (Pet. 6) the customs law must be interpreted in this fashion to ensure that it has an opportunity to comment on the Secretary's change in "established and uniform practice." Petitioner is not entitled to any such opportunity for comment. 19 U.S.C. 1315(d) does not require the Secretary to solicit comments of interested parties; it merely requires the Secretary to publish a notice that he intends to change an established and uniform practice that he has found to exist. 19 C.F.R. 177.10 does provide that interested parties shall have an opportunity for comment; however, 19 C.F.R. 177.10 is applicable only where the Customs Service has itself created an established and uniform practice by published ruling. See *Rank Precision Industries, Inc.* v. *United States,* 660 F.2d 476, 480 n.11 (C.C.P.A. 1981).

The Customs Service has not published any such ruling here. Accordingly, even if the court had by mandamus ordered the Secretary to "find" that an established and uniform practice existed, as petitioner requested (Pet. 6), petitioner would not have been entitled to any opportunity for comment.

2. Petitioner suggests (Pet. 8-10) that the decision below violates the constitutional and statutory requirement that the treatment of imports be uniform, but that contention is doubly inappropriate in this case. First, the merchandise involved in this case is imported at only two ports in the United States. See Pet. App. 3a, 12a & n.11. Since nothing in the record indicates that any other importers at these two ports have been treated any differently from petitioner, either as to the timing of their receipt of actual notice or as to the classification of their imports, there is no evidence of actual nonuniformity. Second, the decision below holds only that petitioner cannot complain of the classification of its goods on the ground of failure to publish the statutory notice. It does not preclude any importer from challenging the new tariff rate as substantively invalid for any reason, including nonuniformity of application. The decision below expressly left open the question whether the new tariff is substantively valid. See *id.* at 16a n.16.

3. Finally, petitioner's contention (Pet. 10-13) that the decision below conflicts with decisions requiring agencies to explain departures from prior agency practice is sophistic. The United States argued throughout this litigation that the courts lack authority to determine initially whether an "established and uniform practice" exists. The United States asked that the case be remanded to the Secretary so that he could consider whether an established and uniform practice existed in this case and, if so, explain why and whether a change is warranted. Petitioner urged the courts to decide whether an established and uniform

practice existed. It is because the courts followed petitioner's urging that the Secretary has had no opportunity to explain why and whether a change is required. Moreover, the court below expressly stated that petitioner "remains free to challenge the correctness of [the new rate] on its own merits, if proper protests have been filed" (Pet. App. 16a n.16). Thus, no intervention by this Court is required to ensure that the Secretary provides an explanation concerning why a new tariff is appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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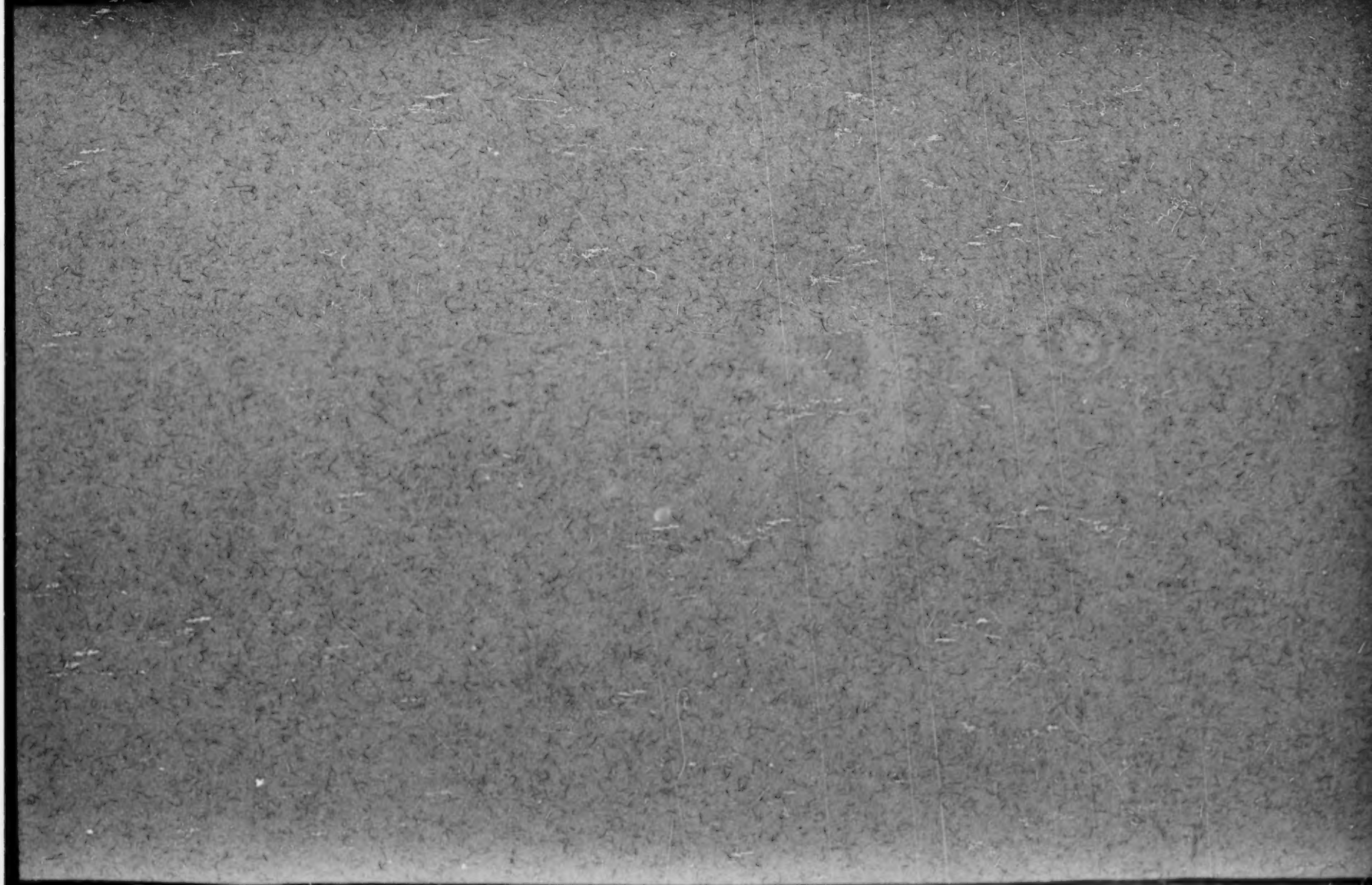

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v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY BRIEF

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UNITED STATES,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY BRIEF

THE ISSUES ARE RIPE FOR REVIEW

1. Customs Deliberately Refused to Make the Required Finding.

The government materially misstates the position the Customs Service had taken throughout this litigation as to why it departed from its prior classification practice. After conceding in its brief that it did in fact depart from such a practice here without explanation, Customs then goes on, in an apparent attempt to justify that failure, to claim falsely that Customs was prevented from giving an explanation by petitioner's own conduct in this litigation.

Nothing of the sort occurred, and the record is conclusive on this point. Rather, seeking to have this Court deny the writ, Customs has deliberately injected a non-existent issue.

The record incontrovertibly proves that, from the beginning of this litigation, Customs claimed that remand was inappropriate. (*See* Custom's Memorandum in Opposition to Motion to Strike; Custom's Reply [its Cross-Motion to Dismiss] at 13-14, n.8.) Only after Custom's motion to dismiss had been denied (Pet. App. 34a-47a) did it begin to reverse its position and first suggest remand as an appropriate remedy—a tactical reversal intended to avoid a finding by the Court of International Trade that a practice in fact existed. Even then, respondent sought to *avoid* remand by requesting that the Court first certify for interlocutory appeal the question of whether it could properly make that finding and, in so doing, issue a "stay of any remand pending the perfection and taking of an appeal." (Custom's Response in Opposition to Motion for Summary Judgment and Cross-Motion for Summary Judgment in its Favor, p. 23, n.21.)

Unquestionably, it is not "because the courts followed petitioner's urging that the Secretary has had no opportunity to explain why and whether a change is required," as is suggested by Customs (Resp. 8). Rather, the Secretary assiduously avoided making the finding with which he was—and is—charged under the law (19 U.S.C. §1315(d)) and procedurally sought to avoid being required to explain the reasons for the change.

The Secretary could, and should, have made this finding prior to imposition of a higher rate of duty, but did not. The lower courts so held. Indeed, he was required by law to have made the finding in response to petitioner's ad-

ministrative protest; but, as the Court below held, there was a "failure of the Secretary to act on the subject in any respect" (Pet. App. 8a). The Secretary had a further opportunity to explain his reasons when the issue was again raised by petitioner in a letter to Customs dated March 10, 1978. (Custom's Response to Statement of Material Facts ¶8). Again, the Secretary failed to do so. The issue of the existence of a uniform practice was then raised in petitioner's complaint, and the Secretary most certainly had the opportunity to determine whether an "established and uniform practice" existed and explain his reasons for departing from it prior to the filing of Custom's answer. Again, the Secretary did not do so, electing instead to take the position that he could avoid 19 U.S.C. §1315(d) by refusing to act, and further that the court lacked jurisdiction to do anything about it.

After the filing of the complaint, petitioner further pursued the issue of the existence of the practice, with its counsel supplying details in a series of nine letters over a period of nearly three months (*id.* at ¶5) of the "300 entries [which] were documented at the ports of Newark and John F. Kennedy International Airport (JFK)" (Pet. App. 3a), but to no avail.

Moreover, there is no statutory or regulatory prohibition against the making of such a "finding" by the Secretary at any time, despite the fact that the issue is in litigation. Contrary to Custom's assertion in its brief, the failure of the Secretary to make the finding of the existence of an established and uniform practice and to explain his departure from it are in no respect the fault of Petitioner.

Custom's suggestion that the Secretary's failure can somehow be cured by an explanation at a later trial on the

substantive issues in the case, some ten years or more after the issue first arose, is irrelevant. The law does not countenance such belated after-the-fact "justification" of the agency action taken. The required explanation must precede or accompany the action taken "[T]he grounds for an agency's disparate treatment of similarly situated applicants must be reasonably discernible *from its report and order*", *Contractors Transport Corp.* v. *United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) (emphasis added), rather than be supplied after the fact. Otherwise, the lack of explanation *at the time of the agency action*—the defect which has led the courts to overturn so many agency actions—would in all cases be self-curing during the course of such litigation.

The Secretary in this case has avoided at all costs making a finding, despite repeated opportunity to do so. To hold that he may properly dodge such a finding and that the Courts cannot (as they did here) rule that the finding was required by law, "would render §1315(d) a nullity in the hands of a Secretary choosing to refrain from ever making a finding." *Ditbro Pearl Co., Inc.* v. *United States*, 515 F.2d 1157, (CCPA 1975) (Markey, C.J., concurring).

2. Customs Ignored the Governing Statute, Its Own Regulations and the Constitution.

By avoiding the "finding", the Secretary (a) has avoided the publication requirement of 19 U.S.C. §1315(d), (b) has avoided taking into account public comment, (c) has avoided explaining the reasons for the change, (d) has placed petitioner at an extreme disadvantage compared to its competitors, (e) has destroyed uniformity of customs classification contrary to the Constitution and (f) has set the stage for future Secretaries to avoid the required publication by refusals to make such "findings".

Seeking to avoid these conclusions, Customs misstates established law with regard to the application of 19 C.F.R. 177.10 to changes in a uniform and established practice. It cites *Rank Precision Industries, Inc.* v. *United States,* 660 F.2d 476 n.11 (CCPA 1981), for the proposition that §177.10 "is applicable only where the Customers Service has itself created an established and uniform practice by published ruling" (Resp. 6). But, that footnote refers only to the creation of a practice, not to a change in such a practice. Indeed, the note explains the difference in the creation process for the two "types" of uniform practice. Publication is required to create a practice under 19 C.F.R. 177.10(b), while no publication is required to create a practice *directly* under 19 U.S.C. §1315(d). Termination of either, however, requires publication.

19 C.F.R. 177.10 itself applies to practices created in either manner. "No published ruling under the provisions of this section will have the effect of changing either an earlier published ruling [which, under that same section (19 C.F.R. 177.10(b)) establishes a practice] or a practice established by *other means*" 19 C.F.R. 177.10(b) (emphasis added). The only means *other* than publication of a ruling to establish a practice is directly, pursuant to 19 U.S.C. §1315(d), by long continued and uniform classification.

3. The Record Does Not Establish That Customs Acted Uniformly in Terminating the Existing Practice.

Custom's spurious claim that, despite the findings of the lower courts to the contrary, the record established a lack of actual nonuniformity (Resp. 7) is absurd. It is also belied by reference of record to contemporaneous importations of fused quartz/fused silica by importers other than petitioner through the Customs Districts of Detroit, St. Albans, Vermont, Los Angeles, Boston, San Francisco and Buffalo.

CONCLUSION

19 U.S.C. §1315(d) was intended to effectuate the uniformity of tariff treatment mandated by the Constitution. But, if the Court of Appeals for the Federal Circuit is not reversed, then the Secretary of the Treasury may nullify that Statute at will merely by failing, or, as he did in this case, intentionally refusing to make the finding with which he is charged under Section 1315(d). This leaves imports by different importers, or in various parts of the country, to be treated differently, on an individual basis at the whim of the Customs officials rather than uniformly as the Constitution and this Statute intended.

Accordingly, a writ of certiorari should issue to the Court of Appeals for the Federal Circuit.

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